No. 84-1070

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

LARRY WITTERS,

Petitioner,

v.

STATE OF WASHINGTON
DEPARTMENT OF SERVICES FOR THE BLIND,

Respondent.

On Writ Of Certiorari To The Supreme Court Of The State Of Washington

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BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

A blind student who was medically eligible for vocational rehabilitation funds was denied assistance by the Washington State Commission for the Blind on the sole ground that his vocational objective was to be a pastor, missionary, or Christian education director.

1. Does the Establishment Clause of the First Amendment prohibit a blind student who is studying for the ministry from participation in a federal and state funded vocational rehabilitation program for which he is statutorily and medically eligible?

2. Did the Supreme Court of Washington State err by applying the "tripartite" Establishment Clause test to a single, blind student rather than examining the entire statutory program?

3. Did the Department for Blind violate the Free Exercise Clause of the First Amendment by denying participation in a vocational rehabilitation program to a blind student for the sole reason that his vocational objective was to be a minister, missionary, or Christian education director?

PARTIES

All parties are listed in the caption.

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the Supreme Court of the State of Washington is reported at 102 Wn. 2d 625, 689 P.2d 53 (1984). The oral opinion of the Superior Court of Spokane County, Washington, the Honorable Marcus M. Kelly, made on December 11, 1981, was included in the Petition for Certiorari as Appendix D.[1] It is unreported. The Findings of

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[1] References to the opinions below contained in the Petition for Certiorari in Appendixes A-F are cited as C.P. A-1, etc. References to the Joint Appendix are cited as J.A. at ____, etc.

Fact and Conclusions of Law entered on May 26, 1982, in said Superior Court appear in the Joint Appendix at 7.

Two unreported written decisions were entered by the Office of Hearings of the State of Washington, Department of Social and Health Services. The initial decision was entered on October 28, 1980 by Paul B. Hutton, Hearings Examiner. This decision is attached as Appendix F to the Petition for Certiorari. This decision was affirmed on administrative review on December 3, 1980 by Monty Foster, Review Examiner. This decision is attached as Appendix E to the Petition for Certiorari.

JURISDICTION

This case was decided and judgment was entered by the Supreme Court of the State of Washington on October 4, 1984. The jurisdiction of this Court is invoked under Title 28 of the United States Code Sec. 1257(3). The Petition for Certiorari was filed on January 2, 1985, within the 90 days provided by Supreme Court Rule 12.1.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Amendment I:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ."

U.S. Constitution, Amendment XIV:

> ". . . [N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Revised Code of Washington 74.16.181:

> "The commission may maintain or cause to be maintained a program of services to assist visually handicapped persons to overcome vocational handicaps and to obtain the maximum degree of self-support and self-care. Services provided for under this section may be furnished to clients from other agencies of this or other states for a fee which shall not be less than the actual costs of such services. Under such program the commission may: . . .
>
> (3) Provide for special education and/or training in the professions, business or trades under a vocational rehabilitation plan, and if the same cannot be obtained within the state, provisions shall be made for such purposes outside of the state. Living maintenance during the period of such education and/or training within or without the state may be furnished."

STATEMENT OF THE CASE

Larry Witters is a young blind man who, at the time this case began, was studying to become a pastor, missionary, or Christian youth director. J.A. 7-8. He was enrolled as a student at Inland Empire School of the Bible in Spokane, Washington J.A. 7.

Inland Empire is a non-denominational Christian school offering a one-year bible certificate, a three-year Bible diploma, and a four-year Bachelor of Arts Degree. J.A. 8. It is a private institution supported by donations and tuition payments and is managed by a board of directors. J.A. 8. At the time he originally applied for aid, Witters was enrolled in the three-year program. But at the time of the Superior Court hearing he had switched to the four-year Bachelor of Arts Program.[2] J.A. 8. The

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[2] The State Supreme Court correctly points out in its opinion that Witters' four-year program was in joint participation with Whitworth

curriculum for his course of study to become a pastor included Old and New Testament studies, ethics, speech, and church administration. J.A. 8.

Witters met the medical and physical eligibility requirements of R.C.W. Chap. 74.16 for status as a legally blind person qualifying him to receive educational assistance from the State Commission for the Blind.[3] J.A. 7. Witters applied to the Department for the Blind to participate in a vocational rehabilitation program which it administered. The program is funded by approximately 80 percent federal funds and 20 percent state funds. J.A. 7.

Witters' application for participation was denied for the sole reason that his vocational objective was to become a minister. J.A. 8.

The Department for the Blind adopted a policy statement which provided, in part:

> Private institutions or out of state institutions: The Washington Constitution forbids the use of public funds to assist an individual in the pursuit of a career or degree in theology or related areas.

J.A. 4.

College. C.P. A-3. Whitworth is a private Presbyterian college also in Spokane. The Department for the Blind complains in its Brief in Opposition to the Petition for Certiorari that Whitworth's participation in the program was not a part of the Findings of Fact and thus "not a part of the record below." Brief in Opposition 2. However, the Department did not object when Whitworth's participation was indicated in the briefs in the State Supreme Court. See Brief of Appellant 2. Thus, the State Supreme Court adopted this fact in its decision. In any event, Petitioner sees no constitutional significance to this alleged "dispute" of facts. Both schools are private religious colleges and Witters was pursuing the same religious vocational objective.

[3] The Commission's name has been subsequently changed to "State of Washington, Department of Services for the Blind." Hereinafter we will refer to this agency as the "Department for the Blind."

The Department for the Blind viewed Witters' desired career as a pastor as falling within the "related areas" to a degree in theology.

The policy does not prohibit attendance at religious schools, so long as the student is studying for a career other than the ministry. J.A. 4. The sole reason for the disqualification of Larry Witters was his goal to be a minister. The fact that his college was religious in nature was not considered in disqualifying him.

An administrative review of the Commission's decision resulted in a reaffirmation of the initial denial of assistance. This decision was affirmed by the initial hearings examiner in the administrative process on October 28, 1980. This examiner acknowledged that Witters raised federal constitutional questions in written memorandum but "dismisse[d] Appellant's U.S. Constitutional arguments since he does not have the authority or jurisdiction to hear and decide such cases." C.P. F-6.

Upon internal administrative review, the review examiner gave more consideration, but once again rejected Witters' federal constitutional claims which had been raised in the written memorandum of authorities. The review examiner noted:

> The Appellant finally urges that even if the state constitution is construed to deny aid, such denial violates the 14th Amendment and it also violates the First Amendment's guarantee of free exercise of religion. The Appellant's arguments concerning the 14th Amendment of the United States Constitution are discussed above [C.P. E-4] and will not be further

> discussed here. The First Amendment to the United States Constitution guarantees free exercise of religion. It does not require that the state subsidize religious study.

C.P. E-7-8.

An appeal was taken to the Spokane County Superior Court pursuant to the Washington Administrative Procedure Act. R.C.W. 34.04. The Superior Court upheld the Department's denial of funds based upon the provisions of the Washington State Constitution which prohibit aid to religious schools. J.A. 9-10.

Witters again raised free exercise and equal protection claims under the United States Constitution in the Superior Court by way of trial brief and oral argument. The Superior Court rejected, albeit somewhat reluctantly, Petitioner's federal constitutional arguments. The trial judge said:

> Mr. Farris, you have raised some intriguing arguments that have given this Court fits, for want of a better term. The area that gives me the most concern in this case, is I do not see any conflict here between what is done here and either the First Amendment of the United States Constitution, the Establishment Clause, the practice [free exercise] clause. The area that gives me concern is the equal protection. That gives this Court some concern.

C.P. D-31-32.

An appeal was taken to the Washington State Court of Appeals, which then certified the issue to the State Supreme Court because of the importance of the issues.

At both the trial court level and on appeal, the Petitioner took the position that the State Constitution, properly construed, did not prohibit his participation in this program, but if the State Constitution did mandate his

exclusion, the State Constitution was in violation of the Federal Constitution's Free Exercise and Equal Protection Clauses.

Faced with federal constitutional challenges to the State Constitutional provisions, on October 4, 1984, the Washington State Supreme Court ruled, by a seven-to-two vote, that the Establishment Clause of the First Amendment of the United States Constitution prohibited aid to Larry Witters because he wanted to be trained to be a minister. Because of this ruling, the State Supreme Court did not reach a decision on the state constitutional issues.

The Washington Court focused on the "second prong" of the Establishment Clause test and ruled that permitting Larry Witters to participate in this vocational rehabilitation program would have the "primary effect" of advancing religion since his goal was to be a minister.

The majority considered and rejected Witters' free exercise and equal protection arguments in light of its ruling that the Establishment Clause prohibited government aid for his studies. "We hold that the Commission's refusal to provide financial assistance did not violate the free exercise clause of the federal constitution." C.P. A-16. "This precludes any need to determine whether the denial of aid on state constitutional grounds would violate the equal protection clause of the Fourteenth Amendment." C.P. A-17.

In effect, the Department for the Blind has taken the position that its own statute is unconstitutional as applied to Larry Witters. Petitioner has taken the position throughout the proceeding that the funding program which is open to all medically eligible persons is constitutional, but to deny him aid violates both the Free Exercise

and Equal Protection Clauses of the United States Constitution.

SUMMARY OF ARGUMENT

For a statute to survive a challenge under the Establishment Clause of the First Amendment this Court has required a three-part showing: (1) the statutory program must have a secular purpose, (2) the principal or primary effect of the program must neither advance nor inhibit religion, and (3) the aid must not foster excessive government entanglement with religion. In this case, the second portion of this test is in dispute.

The Department for the Blind has taken the position that its own statute is unconstitutional as applied to Larry Witters. The Washington Supreme Court found that the source of this "unconstitutionality" was that the primary effect of permitting Witters to participate in the program of vocational rehabilitation advanced religion and thus violated the Establishment Clause.

This analysis is in error. The primary effect of a program which neutrally provides public assistance benefits to all blind citizens does not advance religion. Even if a ministerial student participates in the program, the primary effect of the program remains the same—it helps blind people obtain training and find employment.

This Court has consistently ruled that programs of financial aid which merely allow students who are receiving a religious education to participate on an equal basis with all other students does not have the primary effect of advancing religion. The aid is for the benefit of students, not religious institutions.

The central error of the state court was its focus solely on Witters' training as a minister to judge the primary

effect of this program. To properly judge whether the program has the primary effect of advancing religion, the program as a whole must be examined. When it is so examined, it becomes obvious that its primary effect is to aid blind people vocationally. Any effect upon religion is incidental.

The idea of excluding ministers or ministerial students from participation in a neutral government program is contrary to the intent of the Framers of the First Amendment. James Madison and Thomas Jefferson clearly advocated that ministers should be treated by the government on an equal basis with doctors, lawyers and other professions.

Denying Witters' participation also is contrary to the long standing practice of the United States Congress to permit veterans to use their G.I. Bill benefits to study for the ministry. If the State Supreme Court is not reversed, this aspect of the G.I. Bill will be implicitly ruled unconstitutional since the programs are indistinguishable for Establishment Clause purposes.

While the Establishment Clause does not require disparate treatment of a blind ministerial student because of his religious vocational choice, the Free Exercise Clause forbids it. Witters has been singled out for an exception to the general rule of participation solely because he has chosen a religious career.

He is not asking for a special exception to a general rule because of his religion. Nor is he asking for government funding when the state legislature has not seen fit to grant it. He asks only for equal treatment according to the terms of the state statute. Since his only disqualifying factor is his religious career choice, the Free Exercise Clause demands that he receive the equality of treatment he seeks.

ARGUMENT

I

PARTICIPATION BY A BLIND MINISTERIAL STUDENT IN A NEUTRAL PROGRAM OF VOCATIONAL REHABILITATION WHICH IS OPEN TO ALL DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE

This Court is once again confronted with an agency of state government which seeks to insure the "separation of church and state" with such zeal that the right of equal participation by religious citizens has been trampled in the process. Just as the state university in *Widmar* v. *Vincent*, 454 U.S. 263 (1981), and the Tennessee Constitution, in *McDaniel* v. *Paty*, 435 U.S. 618 (1978), sought to prohibit participation by religious persons, the Washington Department for the Blind seeks to deny to Larry Witters benefits which are generally available to all citizens[4] because his career goal is "too religious."

This case, like *Widmar* and *McDaniel*, involves the interplay between the Establishment Clause and the Free Exercise Clause[5] of the First Amendment. However, before the proper harmony between the two Religion Clauses can be found, each requires separate analysis. We turn first to the Establishment Clause.

Establishment Clause cases are generally analyzed under three criteria: (1) the statutory program must have a secular purpose, (2) the principal or primary effect of the programs must neither advance nor inhibit religion, and

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[4] Provided, of course, that they meet the medical criteria of visual impairment.

[5] Both Clauses have, of course, become applicable to the states by virtue of this Court's decisions interpreting the Fourteenth Amendment Due Process Clause. See, e.g., *Cantwell* v. *Connecticut*, 309 U.S. 626 (1940).

(3) the aid must not foster excessive government entanglement with religion. *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971).

We discuss the first and third parts of this test initially, because there is little dispute concerning the issues of "secular purpose" or "excessive entanglement."

The statutory purpose is set forth in R.C.W. 74.16.181:

> The commission [for the blind] may maintain or cause to be maintained a program of services to assist visually handicapped persons to overcome vocational handicaps and to obtain the maximum degree of self-support and selfcare.

The Washington Supreme Court had no trouble in finding that said legislative purpose was constitutionally permissible.

> The state clearly has an interest in assisting the visually handicapped. We need only look to the above quoted statement of purpose found in RCW 74.16.181 to hold that this statute has a valid secular legislative purpose.

102 Wn. 2d, at 628, 689 P.2d, at 56.

We anticipate no dispute on this point by the Department for the Blind. Helping blind people with vocational training is a legislative purpose which is both commendable and clearly secular.

There is absolutely no evidence in the record that permitting Larry Witters to participate in the vocational rehabilitation program would foster *any* entanglement between church and state, much less an excessive entanglement which would render his participation unconstitutional. The Washington Supreme Court said:

> The case before us is much different. This case involves one person's effort to get financial assistance

> for his theological training. The three-pronged "entanglement" inquiry is ill-suited to this case. In addition, the administrative and trial court records do not provide an adequate factual basis to make the type of inquiry contemplated by the Supreme Court.

102 Wn. 2d, 630, 689 P.2d, at 57.

The factor upon which this case turns is the second portion of the tripartite test, *to wit:* whether the program has the "primary effect" of aiding or inhibiting religion.

This Court has consistently held that programs which aid students do not have the primary effect of advancing religion, while programs which aid religious institutions oftentimes do.[6] Therefore, to determine the "primary effect" in this case, this Court must decide if this program primarily aids blind students or whether it primarily aids religious institutions.[7]

The Washington Supreme Court held that the "primary effect" test of Establishment Clause would be violated if Witters were permitted to participate in the state-admin-

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[6] Even aid to religious institutions is not unconstitutional *per se*. If the aid to the institution is segregated to its secular functions only, this Court has often found such aid to be permissible under the Establishment Clause. See, e.g., *Tilton* v. *Richardson*, 403 U.S. 672 (1971); *Hunt* v. *McNair*, 413 U.S. 734 (1973); *Roemer* v. *Board of Public Works*,426 U.S. 736 (1976).

[7] Even if this case were found to constitute aid to institutions, rather than direct aid to students, the issue would still remain whether this program had the *primary* effect of aiding religious institutions. This Court has rejected any notion that incidental aid to religious institutions violates the Establishment Clause. "One fixed principle in this field is our consistent rejection of the argument that 'any program which in some manner aids an institution with a religious affiliation' violates the Establishment Clause." *Mueller* v. *Allen*, 463 U.S. 388, 393 (1983).

istered program of vocational rehabilitation for the blind. The sole factor leading to this conclusion was that his career objective is to be a pastor, missionary, or Christian youth worker.

We would submit that this conclusion erroneously construes the Establishment Clause in several respects: (1) The state court improperly treated the case as if it involved direct aid to a religious institution; (2) The state court improperly focused on Witters' participation rather than the statutory program as a whole to judge whether the "primary effect" was to advance religion; and (3) The state court ignored the intent of the Framers of the First Amendment and the lessons of history in denying Witters' right of participation.

A

Ministerial Students Are Not Precluded From "Receiving The Benefits of Public Welfare Legislation" By Virtue Of The Establishment Clause

In 1973, this Court observed that "[m]ost of the cases coming to this Court raising Establishment Clause questions have involved the relationship between religion and education." *Committee for Public Education* v. *Nyquist*, 413 U.S. 756, 772 (1973). This case falls into that general trend. The Court, however, noted that there were generally two types of religion-education cases: "those dealing with religious activities in the public schools, and those involving public aid in varying forms to sectarian institutions." *Id.*

Although this case clearly does not fall into the former category, it is erroneous to conclude that it falls into the latter. Cases which have been decided by this Court "involving aid in varying forms to sectarian institutions" usually look quite different from the situation presented

by the case at bar. The "state aid to religious institution" cases are usually the result of what the Court in *Nyquist* termed "ingenious plans for channeling state aid to sectarian schools." 413 U.S., at 785.

When the Washington legislature enacted its program of aid to blind students, although it did not exclude students in religious schools or those studying for religious careers, it was clearly a program that was without the type of "ingenuity" the Court referred to in *Nyquist*. The Washington program was designed purely and simply to aid blind people. No one has dared to suggest that the Washington legislature was looking for a way to maneuver around the various decisions of this Court in order to channel some state funds to religious institutions.

1. This Is A Neutral Program Of Student Aid Broadly Available To All Blind Persons.

It would appear that a third class of Establishment Clause cases has arisen. They are succinctly identified by this Court's recent observation in *Mueller* v. *Allen*, 463 U.S. 388, 398-399 (1983):

> As *Widmar* and our other decisions indicate, a program . . . that neutrally provides state assistance to a broad spectrum of citizens is not readily subject to challenge under the Establishment Clause.

We would submit that the statutory program for vocational rehabilitation for blind people in the State of Washington, which includes all classes of students, those in public and private schools, those in secular and sectarian schools, and those with secular and religious career objectives, is such a program.

The decision by the Supreme Court of Washington is wholly reliant upon principles and "sweeping utterances" *Walz* v. *Tax Commission*, 397 U.S. 664, 668 (1970), from

the line of cases involving aid to religious institutions. A far different result is reached when the correct line of authority is applied. This Court has consistently upheld the right of religious individuals to participate in neutral programs in the face of Establishment Clause challenges.

Any analysis of the distinction between aid to religious institutions and the right of religious persons to participate in programs open to the public at large must begin with *Everson* v. *Board of Education*, 330 U.S. 1 (1947). In that case this Court upheld the constitutionality of a New Jersey statute which permitted "tax-raised funds to pay the bus fares of parochial school pupils as a part of a general program under which it pays the fares of pupils attending public and other schools." 330 U.S., at 17. This Court held that the Establishment Clause did not forbid students who were receiving a religious education from participating in these kind of public programs. In what has become a well-used series of examples of permissible "aid to religion," this Court reasoned that allowing students to ride buses at taxpayers' expense was no more violative of the Establishment Clause than providing "ordinary police and fire protection, connections for sewage disposal, public highways and sidewalks" 330 U.S., at 17-18, for religious schools and institutions. The Court reasoned that the State of New Jersey "**cannot exclude individual** Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-Believers, Presbyterians, or the members of any other faith, *because of their faith, or the lack of it*, **from receiving the benefits of public welfare legislation**." 330 U.S., at 16. (Italics in original, bold print added for emphasis).

Like the students in *Everson*, Witters is receiving a religious education. Aid to the blind for vocational rehabilitation is precisely the kind of public welfare legis-

lation which the language of *Everson* authorized. In *Board of Education* v. *Allen*, 392 U.S. 236 (1968), the Court clearly indicated that this principle of the right of equal participation declared in *Everson* was to be broadly construed. In discussing *Everson*, the Court said: "the Establishment Clause does not prevent a State from extending the benefits of *state laws* to all citizens without regard for their religious affiliation . . ." 392 U.S., at 242. (Emphasis added).

In *Board of Ed.* v. *Allen*, this Court permitted the loan of textbooks to all students of the state without regard to their enrollment in public, private, or religious school. But it is clear from the language of the Court in both *Everson* and *Board of Ed.* v. *Allen*, that this principle is not limited to police and fire protection, sewers, sidewalks, transportation, textbooks, or public welfare legislation. The principle that the Establishment Clause does not prevent a state from allowing religious citizens from participating equally[8] in its programs is a principle which extends to all "state laws." 392 U.S., at 242.

Although this Court recognized in both *Everson* and *Board of Ed.* v. *Allen* that there was incidental benefit to religious schools,[9] the program in each case was held to be one where "the financial benefit is to parents and children, not to schools." *Board of Ed.* v. *Allen*, 392 U.S., at 244. When the reverse is true, this Court's general rule has been:

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[8] We discuss in Section II, the requirements of the Free Exercise Clause which demands equal treatment of religious persons. For Establishment Clause purposes it is sufficient to demonstrate that equal treatment is not prohibited.

[9] *Everson*, 330 U.S., at 17; *Board of Ed.* v. *Allen*, 392 U.S., at 244.

> Thus, the schools, rather than the children, truly are the recipients of the service and, as this court has recognized, this fact alone may be sufficient to invalidate the program as impermissible direct aid.

Wolman v. *Walter*, 433 U.S. 229 (1977).

In a variety of other religion-and-education cases, this Court has consistently followed the principle of approving aid to students while disapproving most direct aid to religious institutions. The Court has upheld the constitutionality of programs if, in the Court's judgment, the true effect of the laws is to aid parents and students as opposed to "ingenious plans for channeling state aid to sectarian schools." *Committee for Public Education* v. *Nyquist*, *supra*, 413 U.S., at 772. Thus in *Meek* v. *Pittenger*, 421 U.S. 349 (1975), this Court upheld the constitutionality of Pennsylvania's textbook loan program on the grounds that it constituted a "financial benefit . . . to parents and children, not to the nonpublic schools." 421 U.S., at 361. But at the same time in *Meek*, the Court ruled that loans of instructional materials and the provision of "auxiliary services" violated the Establishment Clause because those portions of the program were direct aid to the religious institutions. 421 U.S., at 369. See also, *Wolman* v. *Walter*, *supra*; *Committee for Public Education* v. *Regan*, 444 U.S. 646 (1980).

Even if the form of the aid appears to be directed toward students or parents, this Court has held such aid to violate the Establishment Clause if "the effect of the aid is unmistakably to provide desired financial support for nonpublic, sectarian schools." *Committee for Public Education* v. *Nyquist*, *supra*, 413 U.S., at 783.

The principles set forth in *Mueller* v. *Allen*, *supra*, are, we would submit, especially applicable to this case. In

Mueller, this Court sustained the constitutionality of a Minnesota program which permitted income tax deductions for special tuition and related school expenses. Although the tax deduction had special practical significance to those whose children attended private and parochial schools, the deduction was available to all parents including those with children in the public school. The Court said that programs which "neutrally provide state assistance to a broad spectrum of citizens is not readily subject to challenge under the Establishment Clause." 463 U.S., at 398-399.

The Court identified factors which help to determine whether an aid program is truly for the benefit of students and parents, or whether, as in *Nyquist*, the aid to parents is a ruse. First, in *Mueller*, the Court noted that "under Minnesota's arrangement public funds become available only as a result of numerous, private choices of individual parents of school-age children." 463 U.S., at 399. Second, the Court said: "Where, as here, aid to parochial schools is available only as a result of decisions of individual parents, no 'imprimatur of state approval,' *Widmar, supra*, at 274, can be deemed to have been conferred on any particular religion or on religion generally." *Id.*

The only reason any state funds would flow directly or indirectly to Inland Empire School of the Bible or Whitworth College is the result of "numerous, private choices" made by Larry Witters. First of all, Witters was required to choose to become trained for a vocation. He could have chosen to sit idly without training and without work because of his visual handicap. Second, Witters made the private choice to study for the ministry. And finally, Witters had to choose to enroll in the particular program which the two schools provided.

Neither the state nor the religious schools played any role in his decisions. This case seems much "cleaner" in this regard than some of the other programs this Court has found to be constitutionally permissible. For example, in *Meek* v. *Pittenger, supra*, this Court permitted loans of textbooks to students in religious schools. The method in which the books were chosen required, as a practical matter, some influence and participation by the religious school. The student made his "request" to the nonpublic school. The school in turn "summarized" the requests and forwarded them to the state agency. 421 U.S., at 361. One could safely assume that in a nonpublic high school history course, for example, it would be desirable for all of the students to use the same textbook. Either the school exerted some influence on the choice, or the students showed unanimity of thought which is uncharacteristic of most teenagers.

No one but Witters was involved in his series of choices to study for the ministry. It takes an active imagination to suggest that the "imprimatur of State approval" abides on Witters' decision when in *Meek*, no such imprimatur was found.

Blind students may choose to go to public or private colleges. They may choose between sectarian and nonsectarian schools. They may choose secular occupations, and insofar as the State legislature was concerned, they could choose a religious occupation. They may choose to become a teacher. Once becoming a teacher, they may choose to be employed in a variety of schools—one that is pervasively religious, one which has a religious foundation but is essentially secular, one that is a private secular school, or they may teach in a public school.

The Department for the Blind has no means of preventing one who is trained in a secular field from turning that training into a religious career. In addition to teachers, one could major in a foreign language and could choose a religious career as a Bible translator for a mission society. Or such a student could choose a secular career and work at the United Nations as a translator. A blind student could major in social work and go to work for a group like the Union Gospel Mission, and do missionary work among the nation's poor. The same student could make a secular choice and become employed by a government agency. A person could be trained as an airplane mechanic and work for a mission society like Missionary Aviation Fellowship or the student could choose a secular use of his or her training by working for one of the nation's commercial airlines.

The choices as to which school to attend and which career to pursue are entirely up to the blind individual. No agency of the state has the power to influence the choice. Neither does any agency of religion have the power under the program to influence which choices students make.

Since it is clear that the program of aid to the blind is one where individuals receiving a religious education "receive the benefit of public welfare legislation," *Everson*, 330 U.S., at 16, on an equal basis with all other citizens, the Department for the Blind's decision to disallow Witters' participation in the name of "separation of church and state" was clearly not required by the Establishment Clause. This Court's decisions are without exception. If the program is available to all, it is not unconstitutional to permit those who receive a religious education to participate on an equal basis with all other citizens.

2. The Washington Supreme Court Misapplied "Sweeping Utterances" From Two Aid-To-Religious-Institution Cases.

The decision of the Washington court was founded not on a logical analysis of the *principles* of this court's decisions in Establishment Clause cases, rather, it lifted a single phrase from each of two cases involving institutional aid to religious schools and applied the phrases in an inappropriate manner.

This Court has itself made a rather forthright observation of the danger in taking quotations from its decisions and stretching their application beyond what was originally before the Court. In *Walz* v. *Tax Commission*, *supra*, 397 U.S., at 668, this Court stated:

> The considerable internal inconsistency in the opinions of the Court derives from what, in retrospect, may have been too sweeping utterances on aspects of these clauses that seemed clear in relation to the particular cases but have limited meaning as general principles.

What the Washington court did was to take "sweeping utterances" from two aid-to-institutions cases and treat them as general principles when in fact they should not be so applied. First, the state court relied upon language from *Hunt* v. *McNair*, *supra*, which said that state aid was impermissible "when it funds a specifically religious activity in an otherwise substantially secular setting." 413 U.S., at 734. The second phrase comes from *Roemer* v. *Board of Public Works*, *supra*. In that case this Court said: "The State may not, for example, pay for what is actually a religious education, even though it purports to be paying for a secular one, and even though it makes its aid available to secular and religious alike." 426 U.S., at 747. Both *Hunt* and *Roemer* involved state aid which was

made directly available to religious colleges. The constitutionality of the aid was sustained in both cases.

These "sweeping utterances" cannot be reconciled with many of this Court's decisions unless they are understood to apply only to cases involving aid to religious institutions. The meetings by the religious group in *Widmar* v. *Vincent*, *supra*, could be appropriately characterized as "a specifically religious activity in an otherwise substantially secular setting." However, this Court found that the religious student group had the right to engage in such specific religious activity because the secular setting had been opened to all. Also, there was no finding by the Court in *Everson*, that the parochial schools were not providing "what is actually a religious education." In fact just the opposite is true, the Court said, "[t]hese church schools give their students, in addition to secular education, regular religious instruction conforming to the religious tenets and modes of worship of the Catholic Faith." 330 U.S., at 3. New Jersey was unquestionably funding one aspect of "a religious education," yet this Court upheld the aid.

Widmar and *Everson* were not decided in error. Rather the Washington Court applied the language from *Hunt* and *Roemer* in error. These cases, which supplied the "magic phrases" used by the lower court, were not addressing the issue of aid to a general class of students, some of whom received a religious education. Their language should not be stretched beyond the institutional aid situation.

In the cases where the Court has permitted direct aid to religious institutions, it has required that there be a clear demarcation between the secular functions and the

religious functions in order to permit the aid.[10] If the school is actually being funded to perform a "specifically religious activity in an otherwise substantially secular setting," it is not permitted. Likewise, if the school uses its state funds to provide a religious education, then direct aid is impermissible. Even the mere possibility that state aid could be diverted for such purposes is sufficient to invalidate the program.[11]

But there is not a single decision of this Court which has denied equal participation in a neutral government program to a person receiving a religious education. If these phrases were actually generally applicable rules of constitutional law, then this Court has "ov rruled" them when it said in *Mueller*, "a program . . . that neutrally provides state assistance to a broad spectrum of citizens is not readily subject to challenge under the Establishment Clause." 463 U.S., at 398-399.

Numerous decisions of this Court become inexplicable if these phrases from *Hunt* and *Roemer* are given the talisman-like effect employed by the Washington court. *Widmar*, *McDaniel*, *Mueller*, and *Everson*, just to name a few, cannot be reconciled if these phrases are principles of constitutional law applicable outside the aid-to-religious-institution cases.

3. Two Decisions On The Merits By This Court Directly Contradict The Establishment Clause Decision By The Washington Court.

The presupposition of the Washington Supreme Court was that Witters was receiving an education that was *so*

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[10] See, e.g., *Tilton* v. *Richardson*, 403 U.S. 672, 679 (1971); *Hunt* v. *McNair*, 413 U.S. 734, 744 (1973).

[11] See, e.g., *Levitt* v. *Committee for Public Education*, 413 U.S. 472, 480 (1973).

religious that the Establishment Clause was violated by his participation, even though the program itself was neutral.

This Court has directly rejected this line of reasoning twice in summary dispositions, which are given the effect of decisions on the merits.

In the case of *Durham* v. *McCloud*, 259 S.C. 409, 192 S.E.2d 202 (1972), the Supreme Court of South Carolina was faced with an Establishment Clause challenge to a state guaranteed student loan program. Students could get state guaranteed loans to "to defray their expenses at any institution of higher learning." 192 S.E.2d, at 203. "No restriction [was] placed upon the course of study undertaken by a borrower." *Id.* Thus, the program was just like the aid to the blind program in Washington state insofar as the eligibility of those attending sectarian schools, including those who were studying for the ministry. In discussing the Establishment Clause challenge the court said:

> We find no merit in this claim. The Act is scrupulously neutral as between religion and irreligion and as between various religions. It simply aids and encourages South Carolina residents in the pursuit of higher education, and leaves all eligible institutions free to compete for their attendance and dollars, neither advantaged or disadvantaged by the operation of the Act. If, on the other hand, sectarian schools had been excluded from the category of eligible institutions, such schools would have been materially disadvantaged by the intervention of the State's loan program.

192 S.E.2d, at 204.

This is, of course, a direct parallel to the program in Washington state. If the South Carolina program can survive a federal Establishment Clause claim, then the

Washington program must be treated in the same manner.

The appeal of this South Carolina case to this Court was dismissed for lack of a substantial federal question. 413 U.S. 902 (1973). Such a dismissal is a decision on the merits entitled to precedential weight as a decision of the United States Supreme Court, *Hicks* v. *Miranda*, 422 U.S. 332, 343-344 (1975).

The dismissal of the *Durham* case came on the same day, June 25, 1973, as this Court decided *Nyquist*, *Hunt* v. *McNair*, *supra*, *Sloan* v. *Lemon*, 413 U.S. 825 (1973), and *Levitt* v. *Committee for Public Education*, 413 U.S. 472 (1973). The timing of the decision adds special significance to a decision that is, by virtue of the precedents of this Court, entitled to precedential weight.

A Tennessee program which also gave secular and religious students an equal opportunity for state assistance was challenged under the Establishment Clause in *Americans United for Separation of Church and State* v. *Blanton*, 433 F.Supp. 97 (1977). Tennessee gave financial aid to college students "solely on the basis of a student's financial need." 433 F.Supp., at 99. The students were permitted to attend any accredited college in the State. The act specifically stated that "no effort is to be made by state officials . . . to influence a student's selection of institutions." *Id.*

The program was challenged because students were allowed to attend sectarian institutions. The three judge panel rejected the challenge, holding:

> In the instant case, as in *Durham*, the emphasis of the aid program is on the student rather than the institution, and the institutions are free to compete for the students who have money provided by the

program. No one religion is favored by the program, nor are private or religious institutions favored over public institutions.

In enacting the Tennessee Student Assistance Program, the Tennessee General Assembly sought to provide needy students with the opportunity to attend the higher education institution of their choice, be it public, private, sectarian, or nonsectarian. To ensure that the neutral purpose would not be compromised, the General Assembly enacted a student aid program rather than an institutional aid program. The statute passes the relevant three-pronged inquiry, and the Court finds that the program on its face and in its application, does not offend the values protected by the Establishment Clause.

433 F.Supp., at 104-105.

If the words "blind students" were substituted for the words "needy students" in the above quotation, one would have a ready-made analysis of the Witters case. The only possible argument which could be raised to attempt to show a distinction between *Blanton* and the present case is: "While it is true that in *Blanton*, students could attend sectarian institutions, Witters' education for the ministry is *so religious* as to justify a different rule."

Three points quickly destroy this argument. First, there was nothing in the Tennessee program to prevent students from using their aid to study for the ministry. Second, the Establishment Clause does not recognize distinctions between education that is "a little religious" and education which is "very religious." And third, the record in the *Blanton* case shows that some of the students were using their state aid to obtain education that was "very religious" indeed.

The plaintiffs appealed the decision of the three judge panel to this Court. In their jurisdictional statement,[12] the plaintiffs in *Blanton* describe the record as being "replete with illustrations of the overwhelming sectarianism of the three colleges with respect to which appellants offered evidence." J.S., at 13. Upon reviewing the evidence cited by the *Blanton* appellants, it is apparent that the schools were at least as religious as the program that Witters was pursuing.[13]

Faced with a record which demonstrated that the Tennessee program permitted sectarian schools to train "future leaders of the Church," this Court summarily affirmed the decision of the three judge panel in *Blanton*. 434 U.S. 803 (1977). Just like a dismissal for want of a substantial federal question, a summary affirmance by this Court "was a decision on the merits . . . entitled to precedential weight." *Meek* v. *Pettinger, supra*, 421 U.S.,

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[12] No. 77-250.

[13] The Jurisdictional Statement notes the following:

> The "supreme purpose" of David Lipscomb College is to teach the Bible as the revealed word of God. The first object of the college is "[t]o provide the best in Christian liberal arts education under the direction of Christians in a distinctly Christian environment." Other major objectives include "*train[ing] future leaders in the church*, and hold[ing] up Christ as the example to follow in every field of activity. . . . (Emphasis added.)
>
> . . .
>
> Chapel attendance is compulsory for both faculty and students and are conducted for worship. Further, every student must take a Bible lesson daily.
>
> . . .
>
> In response to a question from the trial judge, the President of the College admitted that the college attempts to make the religious influence in the school "pervasive." (Footnotes omitted.)

J.S. (77-250), at 13-15.

at 370, fn. 20. In *Meek*, this Court said that a summary affirmance "directly support[s], if not compell[s]" the same result in another case which raises the same issues that were raised in the case summarily affirmed.

Thus, *Blanton* and *Durham*, stand as powerful and directly applicable precedents, and although the decisions were penned by lower courts, the nature of this Court's disposition of both cases causes them to be direct "if not compell[ing]" support for Petitioner herein.

Furthermore, the principles enunciated in the two "summary disposition" cases are directly supported by the full opinions of this Court in *Nyquist* and *Mueller*. Reading *Nyquist* and *Mueller* together demonstrates that this Court has already considered and rejected the proposition advanced by the Washington Supreme Court. These cases hold that the Establishment Clause is not offended by a state aid program where there is evidence of "the significantly religious character of the statute's beneficiary." *Nyquist*, 413 U.S., at 782, fn. 38.

The Court in *Nyquist* specifically reserved the question of whether an aid program similar to the G.I. Bill would survive an Establishment Clause challenge until a case arose with evidence that such aid was being used by the "statute's beneficiary" who was "significantly religious." *Id.* In *Mueller*, the Court said in the opening paragraph of its decision that it was answering the "question [which] was reserved in *Committee for Public Education* v. *Nyquist*. . . ." 463 U.S. at 390.

The result in *Mueller*, of course, was to affirm the principle of equal participation in state programs even if the beneficiaries of the state program used their state aid to obtain a religious education. To state the result of these cases in another way, *Nyquist* reserved the question: "If a

recipient of a general state aid program is significantly religious, will that factor create an Establishment Clause violation?" *Mueller* answered: "[A] program . . ., that neutrally provides state assistance to a broad spectrum of citizens is not readily subject to challenge under the Establishment Clause." 463 U.S., at 398-399.

Although this Court has never directly decided whether or not a student studying for the ministry can participate in a neutral state program for the blind and not violate the Establishment Clause, the decisions of this Court by way of both summary affirmance and full opinions are unmistakably in Petitioner's favor. His right to participate cannot be denied on the basis of the Establishment Clause of the First Amendment.

B

It Is Improper To Evaluate "The Primary Effect" Of A Program For Aid To Individual Persons By Focusing On A Single Student Who Is Receiving A Religious Education

The only reason that the Washington court found that the primary effect of the program of aid for the blind advanced religion was that the court focused solely on Larry Witters and not the program as a whole to make the evaluation. The constitutionality of the program is readily apparent if the program as a whole is the measure of whether or not it has the "primary effect" of advancing religion.

The Department has failed to develop any evidence that there are numerous blind people who would choose to study for the ministry if Witters prevail. Insofar as the record has been developed, Witters is the only blind person in the history of the State of Washington who has applied for aid for the purpose of studying for the ministry.

It is obvious to all that the program as a whole trains blind people for a wide variety of careers, skills, and occupations. It would be patently ridiculous to suggest that, if judged as whole, the program has the primary effect of advancing religion. The primary effect of this program as a whole is unquestionably secular in nature.

The state court upheld the "secular purpose" of the statute by looking at the program as a whole. But then, it switched to an examination of Witters alone to judge the "primary effect" of the program. This switch was totally improper in this kind of case.

The State court once again took a sentence out of one of this Court's decisions, and misapplied it in a way so as to become another "sweeping utterance." *Walz* v. *Tax Commission*, *supra*, 397 U.S., 668. The state court said:

> The second part of the *Lemon* test, that the primary effect of the state aid must neither advance nor inhibit religion, requires that we "narrow our focus from the statute as a whole to the only transaction presently before us." *Hunt* v. *McNair*, 413 U.S. 734, 742 . . . (1973). Rather than look to the face of the rehabilitation statute, which is neutral in that benefits are provided to the student irrespective of the type of school attended or the degree sought, we focus our attention on the particular aid sought by the appellant.

102 Wn. 2d 628, 689 P.2d, at 56.

This quotation from *Hunt*, we would submit, was never intended by this Court to be an ironclad principle of constitutional analysis, especially in cases involving an individual person. In *Hunt*, this Court made the above-quoted statement in connection with a case involving a religious college construction project with state-backed revenue bonds totalling $1,250,000. 413 U.S., at 738. This

is a materially different situation than a single individual participating in a neutral program of public welfare legislation. While we do not suggest that dollar amounts alone require a different means of analysis, programs which aid a specific religious institution with over $1 million in state backed funds naturally suggest some individualized attention.

Even more important than the amount of the funds is the fact that *Hunt* was dealing with aid to an institution. The Court's reasoning and authority for "narrow[ing its] focus from the statute as a whole to the only transaction presently before us" was stated in *Hunt* as follows:

> Aid normally may be thought to have a primary effect of advancing religion *when it flows to an institution* in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission or when it funds a specifically religious activity in an otherwise substantially secular setting. In *Tilton* v. *Richardson*, *supra*, the Court refused to strike down a direct federal grant to four colleges and universities in Connecticut. Mr. Chief Justice Burger, for the plurality, concluded that despite some institutional rhetoric, none of the four colleges was pervasively sectarian, but held that possibility open for future cases:
>
> "Individual projects can be properly evaluated if and when challenges arise with respect to *particular recipients* and some evidence is then presented to show that the *institution* does in fact possess these characteristics." 403 U.S., at 682. (Emphasis added).

413 U.S., at 743.

The Washington court borrowed a phrase from *Hunt*, while studiously ignoring Hunt's reasoning and the reasoning from *Tilton* upon which it was founded. In both of those cases this Court was careful to state that "a narrow focus" was to be used in evaluating aid to religious *institu-*

tions. This Court said nothing about using a narrow focus to judge an individual person participating in a program open to all.

In fact this Court has directly rejected such an approach in *Widmar* v. *Vincent*, *supra*. In Widmar, a student group, Cornerstone, wanted to resume its religiously oriented meetings on the state university campus. The meetings included religious worship. The university argued that the Establishment Clause prohibited it from permitting religious groups to participate in an open forum which it had established for all student groups. This Court unanimously rejected this argument. 454 U.S., at 270-275; Stevens, concurring, *id.*, at 280-281; White, dissenting on other grounds, *id.*, at 282. The University argued that the focus should be on the religious group and whether including it in the limited public forum would have the primary effect of advancing religion. This Court replied:

> The University's argument misconceives the nature of this case. The question is not whether the creation of a religious forum would violate the Establishment Clause. The University has opened its facilities for use by student groups, and the question is whether it can now exclude groups because of the content of their speech. . . . In this context we are unpersuaded that the primary effect of the *public forum*, open to all forms of discourse, would be to advance religion. (Emphasis added).

454 U.S., at 273.

If the language from *Hunt* were really a rule requiring "a narrow focus" on a religious participant,then why did this Court focus on the whole of the public forum in *Widmar*? The obvious answer is that *Hunt* was never intended to create such a "rule."

This Court has consistently looked at the program as a whole whenever it has adjudicated a program where the aid was directed toward individuals rather than religious institutions. See, e.g., *Mueller* v. *Allen*, *supra*; *Meek* v. *Pittenger*, *supra*; *Board of Education*, v. *Allen*, *supra*; *Everson* v. *Board of Education*, *supra*. There is not a single decision of this Court where the Court has "narrowed its focus" upon a religious individual, and found that because of his religiosity, a neutral program became unconstitutional as applied to him.

In *McDaniel* v. *Paty*, *supra*, Tennessee had, in a sense, "narrowed its focus" on ministers. In *McDaniel*, the provision in the Tennessee Constitution which prohibited ministers from holding legislative office was challenged on Free Exercise grounds. Just as in the present case, the State defended saying that its rule excluding ministers was justified on the basis of preventing an establishment of religion. This argument was rejected by this Court. 435 U.S., at 628-629.

Mr. Justice Brennan, in his concurrence, found that not only did the act of participation by a minister not offend the Establishment Clause, but that the exclusion of ministers in fact constituted a violation of both the Free Exercise Clause and the Establishment Clause as well. "The Establishment Clause, properly understood, is a shield against any attempt by government to inhibit religion as it has done here; *Abington School District* v. *Schempp*, 374 U.S. 203, 222 (1963). It may not be used as a sword to justify repression of religion or its adherents from *any aspect* of public life." 435 U.S., at 641 (Emphasis added).

The same result is indicated in the present case. Nothing in the Establishment Clause nor in the precedents of this Court suggests that it is appropriate to

dents of this Court suggests that it is appropriate to "narrowly focus" on Witters and his religious education. When the State selects a ministerial student out for special treatment, not only are there Free Exercise violations, as we argue below, but there is, what could be termed, a "reverse Establishment Clause" violation of the type Mr. Justice Brennan found in *McDaniel*.

The program of aid to the blind must be judged as a whole.[14] Its primary effect is clearly secular as the Supreme Court of Washington itself said: "[T]he rehabilitation statute . . . is neutral in that benefits are provided to the student irrespective of the type of school attended or the degree sought. . . ." 102 Wn. 2d, at 629, 689 P.2d, at 56.

C

Lessons From History Suggest That Students For The Ministry "Ought Therefore To Possess The Same Rights"

1. Jefferson And Madison: The Founders Favored Equality.

In reaching decisions on the Religion Clauses of the Constitution, this Court has treated the views of our

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[14] Even if the focus were placed solely on Larry Witters, there is some doubt that the primary effect of allowing him to study for the ministry under the Department's program would have the primary effect of advancing his religion. He is, presumably, already a committed Christian. His personal faith will not be enhanced. Nor will his sense of "calling" to serve others be enhanced. The spiritual aspect of his calling to the ministry is unaffected by the grant or denial of government benefits.

What has been affected is his ability to take the course of practical training, such a church administration and speech, which enable him to translate his spiritual calling into a job which pays him a salary. The primary effect, even as to Witters, is to simply prepare him for a job which he has chosen. This is clearly secular in nature.

founding fathers as guiding lights which can illuminate an area of law which is fraught with difficulty and controversy.[15] No two individuals have been used in this way with greater reliance than James Madison and Thomas Jefferson. Both Madison and Jefferson were stalwart advocates of the principles which led to the creation of the Establishment Clause. But neither man would, on the basis of their writings, advocate carrying the principle of the "separation of church and state" to the point of denying equality of treatment for one studying for the ministry.

Madison's greatest contribution to the area of religious freedom, other than his direct work on the First Amendment, was his authorship of his famous *Memorial and Remonstrance Against Religious Assessments*. Although the *Memorial* was directed against a specific bill in the Virginia legislature, the various points Madison made have long been regarded as enunciating principles of religious liberty which should be generally applicable in our nation.

The fourth point of Madison's great work declares:

> [T]he bill violates that *equality* which ought to be the basis of every law, and which is more indispensible, in proportion as the validity or expediency of any law is more liable to be impeached. If "all men are by nature *equally* free and independent," all men are to be considered as entering into Society on *equal* conditions; as relinquishing no more, and therefore retaining no less, one than another, of their natural rights. Above all are they to be considered as retaining an "*equal* title to the free exercise of Religion according

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[15] See, e.g., *Lynch* v. *Donnelly*, ____ U.S. ____, 79 L.Ed.2d 604, 611 (1984); *Marsh* v. *Chambers*, 463 U.S. 783 (1983); *Everson* v. *Board of Education*,330 U.S. 1, 8 (1947).

> to the dictates of conscience." . . . As the Bill violates *equality* by subjecting some to peculiar burdens; so it violates the same principle, by granting to others peculiar exemptions. (Emphasis added).

Quoted in full by Mr. Justice Jackson in his dissent in *Everson*, *supra*, 330 U.S., at 66.

Madison consistently argued for equality as one of the necessary ingredients for religious freedom. As this Court noted in *McDaniel* v. *Paty*, *supra*, 435 U.S., at 623-624, Madison opposed a provision which would prohibit ministers from holding public office in Virginia while Thomas Jefferson initially supported the ministerial exclusion. Madison's response was forcefully stated:

> "Does not the exclusion of Ministers of the Gospel as such violate a fundamental principle of liberty by punishing a religious profession with the privation of a civil right? does it [not] violate another article of the plan iself which exempts religion from the cognizance of Civil power? does it not violate justice by once taking away a right and prohibiting a compensation for it? does it not in fine violate impartiality by shutting the doors [against] Ministers of one Religion and leaving it open for those of every other." 5 Writings of James Madison 288 (G. Hunt ed. 1904)

Quoted by Mr. Chief Justice Burger in *McDaniel*, *supra*, 435 U.S., at 624.

The Washington Department for the Blind has "punished a religious profession with the privation of a civil right."[16] Any suggestion that this privation is man-

[16] We are not arguing that there is a "civil right" to have blind people vocationally rehabilitated. The "civil right" here is not the "right" to an education, but the right to equal treatment in a government program. "It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege." *Sherbert* v. *Verner*, 374 U.S. 398, 404 (1963).

dated by the federal Establishment Clause is contrary to the historical arguments of one of the chief authors of that Clause.

Jefferson eventually conceded that Madison had been right. Again, as noted by Mr. Chief Justice Burger in *McDaniel*, 435 U.S., at 623-624, fn.4, Jefferson wrote in 1800 saying:

> "[A]fter 17 years of more experience & reflection, I do not approve . . . [of] . . . the incapicitation of a clergyman from being elected. The clergy by getting themselves established by law, & ingrafted into the machine of government, have been a very formidable engine against the civil and religious rights of man. They are still so in many countries & even in some of these United States. Even in 1783 we doubted the stability of our measures for reducing them to the footing of other useful callings. It now appears that our means were effectual. The clergy here seem to have relinquished all pretentions to privilege, and to stand on a footing with lawyers, physicians, &c. *They ought therefore to possess the same rights*." 9 Works of Jefferson 143 (P. Ford ed. 1905). (Emphasis added).

Some 184 years after Jefferson penned these words, the Washington Supreme Court decided that those who desire to be ministers should have fewer rights than those who desire to be "lawyers, physicians, &c."[17]

Madison and Jefferson, as key representatives of our tradition of religious freedom, have both articulated the principle of equality of treatment for ministers. Those who study for the ministry certainly should benefit from the principle as well. The Department for the Blind's

[17] The trial judge demonstrated the unequal treatment between these professions when he indicated that he had received part of his training at Gonzaga University School of Law, a Catholic institution, using his benefits under the GI Bill. C.P. D-26.

discriminatory decision to exclude Witters solely on the basis of his intended career cannot be justified in light of this history. In the words of Jefferson, Witters "ought therefore to possess the same rights."

2. Our Nation's Recent History Affirms Witters' Right Of Participation: The G.I. Bill.

In at least one other Establishment Clause case which has come before this Court, the argument has been made that the government "aid to religion" before the Court is indistinguishable from the G.I. Bill.[18] *Committee for Public Education* v. *Nyquist*, *supra*, 413 U.S., at 782, fn. 38. The obvious reason for making such an argument is that the G.I. Bill has been so historically accepted that any court decision which would threaten its constitutionality would be seriously questioned. As Mr. Justice Holmes noted, "[a] page of history is worth a volume of logic." *New York Trust Co.* v. *Eisner*, 256 U.S. 345, 349 (1921).

The decision of the Supreme Court of Washington, unless reversed by this Court, does indeed imperil a significant aspect of the G.I. Bill. If Witters must be excluded from studying for the ministry under the aid to the blind program by virtue of the Establishment Clause, then the same fate awaits those who study for the Ministry under the G.I. Bill. Constitutionally, the programs are indistinguishable.

Since its inception, the G.I. Bill[19] has never contained

[18] 38 U.S.C. §1651.

[19] The G.I. Bill has its roots in the Vocational Rehabilitation Act of 1920, 66th Congress (enacted June 2, 1920). It was amended by Public Law 16, Vocational Rehabilitation Act of 1943. The Servicemen's Readjustment Assistance Act of 1944, P.L. 346 (June 22, 1944) was

an exclusion from participation for those who desire to study for the ministry.[20] Today, a multitude of schools are eligible to accept armed forces veterans to train them to become ministers, priests, and rabbis.[21] Inland Empire School of the Bible is also approved by the Veteran's Administration for students who desire to use their G.I. Bill benefits. It is hard to see a constitutional difference between Witters studying under the aid to the blind program and the student across the aisle studying under the G.I. Bill.

Although this Court has said that "[s]tanding alone, historical patterns cannot justify contemporary violations of constitutional guarantees," *Marsh* v. *Chambers*, 463

the first act labeled the "G.I. Bill." It was modifed after the Korean War, Veterans' Readjustment Assistance Act of 1952, P.L. 550, 82nd Congress. It was amended again in 1966, P.L. 89-358, Veterans' Readjustment Benefit Act of 1966. The most recent revisions were made in P.L. 96-466 (1980) and P.L. 97-295 (1982).

[20] Congress has demonstrated that it knows how to create exceptions to the general and broad provisions of the G.I. Bill when it desires to do so. At present, 38 U.S.C. §1673 lists a number of courses which are excluded from the Bill's coverage. These courses include: "any course in bartending or personality development course," sales courses which do not provide specialized training for a specific vocational field, avocational training, and independent study. Study for the ministry is not excluded from the Bill's coverage.

[21] Included in the list of approved institutions for ministerial or rabbinical studies are: Harvard Divinity School, Catholic University, Jewish Theological Seminary, Reconstruction Rabbinical College, Reformed Theological Seminary, Dallas Theological Seminary, Wesley Theological Seminary, and Western Conservative Baptist Theological Seminary. Also VA approved for rabbinical studies are the following institutions in Israel: Rabbinical Seminary of America, Yeshivas Torah Ore, Yeshivat Hamiutar, and Yeshivat Moharil Ashlag. Information from Veteran's Administration Career Development Center, 941 N. Capitol St., N.E., Washington, D.C. 20421.

U.S. 783, 790 (1983), the weight of the history of the G.I. Bill is not insignificant.

If the experience of the G.I. Bill permitting veterans to use government benefits ran counter to the stream of the decisions of this Court on the Establishment Clause, its weight alone would not supply the justification for allowing Witters to participate. But it is the Supreme Court of Washington, not the G.I. Bill that is swimming against the tide of the decisions of this Court as well as the flow of history.

II

THE FREE EXERCISE CLAUSE IS VIOLATED BY SINGLING OUT MINISTERIAL STUDENTS FOR DISPARATE TREATMENT

The factual posture of this case makes the consideration of the Free Exercise issues considerably easier than other situations which have been faced by this Court. Witters does not come to this Court asking it to create a special exception to a general rule because of his religion. Nor is he asking this Court to grant him funding when the state policymakers, the state legislature, has not seen fit to do so. Witters comes to this Court seeking nothing more than equal treatment with all other blind students. He merely asks this Court to prohibit the Department for the Blind from treating him in a disparate manner solely because he has chosen a religious career.

The Washington legislature enacted the statutory authorization for this program, R.C.W. 74.16.181, without limitation as to the career one could pursue. The eligibility statute, R.C.W. 74.16.183,[22] simply required

[22] Since the filing of this case, this eligibility statute has been repealed and replaced with R.C.W. 74.18.130 in 1983. The new

that eligible persons must have "no vision or . . . vision with correcting glasses [which] is so defective as to prevent the performance of ordinary activities for which eyesight is essential or who has an eye condition of a progressive nature which may lead to blindness." It is stipulated that Witters has met the statutory requirement for eligibility. C.P. C-2.

The Washington legislature has demonstrated that it knows how to create an exception for those who are studying for theological degrees[23] when it chooses to do so. In R.C.W. 28B.10.836, the legislature prohibited a program of general aid to students in private colleges from being used by those who were studying for degrees in theology.[24]

R.C.W. 28B is the Higher Education Code for Washington, while R.C.W. Title 74, which contains the aid to the blind program, is the Public Assistance Code for the State. The legislature could, and apparently did, decline

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statute provides in full:

"The department shall provide a program of vocational rehabilitation to assist blind persons to overcome vocational handicaps and to develop skills necessary for self-support and self-care. Applicants eligible for vocational rehabilitation services shall be persons who are blind as defined in R.C.W. 74.18.020 and who also (1) have no vision or limited vision which constitutes or results in substantial handicap to employment and (2) can reasonbly be expected to benefit from vocational rehabilitation services in terms of employability."

This statute, like its predecessor, in no way limits the right of those who are studying for the ministry to participate.

[23] We assume that studying for the ministry would be fairly characterized as a degree in theology or "related area."

[24] This entire program was declared unconstitutional on state constitutional grounds in *Weiss* v. *Bruno*, 82 Wn. 2d 199, 509 P.2d 973 (1973).

to provide aid under the Higher Education Code to a general college student who was seeking a degree in theology. But in the area of Public Assistance, the legislature used its discretion to provide aid to all blind persons without a restriction against those studying for the ministry.[25]

It was, therefore, not the policymakers of the State of Washington who excluded Witters from participation. It was the administrative agency which *sua sponte* decided that it would be unconstitutional to permit Witters to participate. It is interesting to note the Department's view of its legal requirements. The Assistant Attorney General for the Department signed the following stipulation:

> At an earlier administrative hearing, the Deputy Director for the Commission [Department] admitted that its policy was such that the State would pay for Larry Witters['] training if he wanted to be a Communist agitator if there was a job available after such training, but that payments to train him to be a pastor were illegal.

See, Petitioner's Proposed Factual Stipulation before the Office of Hearings (August 21, 1980) signed by counsel for both parties. J.A. 6.

Thus, it is clear that the Department saw no restraint on paying for training for a career which would advance a

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[25] The Commission for the Blind's original decision cites R.C.W. 28B.10.836 as requiring it to exclude Witters from participation. See, letter of Bill Gannon dated March 11, 1980. J.A. 3. However, when Witters pointed out that 28B.10.836 had no relevance to the aid for the blind program, counsel for the Department abandoned the argument contending that said statute was cited for illustrative purposes only. See, Respondent's Memorandum of Authorities, before the Office of Hearings, (August 25, 1980) p.1.

political philosophy, but believed that it was illegal to pay for the training of one who would advance a religion.[26]

It was Witter's choice of a religious career, nothing more or less, which caused the administrative agency to conclude that it would be "illegal" to permit Witters to participate in the program.

The Free Exercise Clause challenge would be substantially more difficult if it had been the policymakers, i.e., the state legislature, which had excluded Witters. But this factual pattern demonstrates that it was a state administrative agency which decided to meddle with the authority of both the legislature and the courts by deciding that Witters should not participate because it was "unconstitutional" for him to do so.

The decisions of this Court leave no room for doubt that a state agency which creates a special exception in order to deny general public welfare benefits to a person solely because of his religious occupation violates the Free Exercise Clause of the First Amendment.

This Court's long-standing interpretation of the Free Exercise Clause is that "a person may not be compelled to choose between the exercise of a First Amendment right and participation in an otherwise available government program." *Thomas* v. *Review Board*, 450 U.S. 707, 716

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[26] The Department's view of what type of training it may assist is curious in light of this Court's statement in *West Virginia* v. *Barnette*, 319 U.S. 624, 642 (1943):

"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in *politics*, nationalism, *religion*, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us." (Emphasis added).

(1981). See also, *Sherbert* v. *Verner*, 374 U.S. 398 (1963). Since the decision of this Court in *McDaniel* v. *Paty*, *supra*, it is beyond debate that the choice of the ministry as a career falls within the protection of the Free Exercise Clause. "[T]he right of the free exercise of religion unquestionably encompasses the right to preach, proselytize, and perform other similar religious functions, or, in other words, to be a minister . . ." 435 U.S., at 626. The language this Court applied to the Rev. McDaniel applies with equal force to Witters. This Court said: "[T]o condition the availability of benefits [including access to the ballot] upon this appellant's willingness to violate a cardinal principle of [his] religious faith [by surrendering his religiously impelled ministry] effectively penalizes the free exercise of [his] constitutional liberties." 435 U.S., at 626.

Witters was disparately treated for precisely the same reason as McDaniel, "the . . . disqualification operates . . . because of his *status* as a 'minister.' . . ." 435 U.S, at 627. Witters faces the choice of giving up his chosen vocation as a minister or giving up his right of participation in the program of aid for the blind. This is the same type of choice which McDaniel faced and which this Court ruled to be unconstitutional. "[U]nder the clergy-disqualification provision, McDaniel cannot exercise both rights simultaneously because the State has conditioned the exercise of one on the surrender of the other. Or, in James Madison's words, the State is 'punishing a religious profession with the privation of a civil right.' " 435 U.S., at 626.

In *Thomas* v. *Review Board*, *supra*, as in *Sherbert* v. *Verner*, 374 U.S. 398 (1963), the employee quit his job because of changed work conditions which required him to choose between violating his religious faith and continuing his employment. In both of these cases, there was a uniform policy that all persons who were unemployed for personal reasons could not receive unemployment benefits. This Court held, in both cases, that since the employees had become unemployed solely in adherence to their religious principles that it was a violation of the Free Exercise Clause to apply the general rules which denied benefits to them.

Perhaps, Mr. Justice Douglas, in *Sherbert*, framed the question in a way that succinctly demonstrates the Free Exercise problem here. He said: "If appellant is otherwise qualified for unemployment benefits, payments will be made to her not as a Seventh-day Adventist, but as an unemployed worker." 374 U.S., at 412. If Witters receives payments from the Department for the Blind, it will be because he is blind, not because he desires to be a minister. Just as *Sherbert* and *Thomas* could not be disqualified from participation solely because of their adherence to their religious faith, Witters may not be disqualified solely because of his religious career choice.

While we rely on the authority of both *Thomas* and *Sherbert*, we believe that the facts in this case demonstrate such a clearcut violation of the Free Exercise Clause that even the dissenters in *Thomas* and *Sherbert* would agree with us here. In *Thomas*, Mr. Justice Rehnquist, in dissent, complained that the majority required Indiana to create a religiously-based exception to their general policy of excluding those who quit for personal reasons for unemployment. 450 U.S., at 720-727. In the same manner, in *Sherbert*, Mr. Justice Harlan, joined by Mr. Justice White, dissented saying: "I cannot subscribe to the conclusion that the State is constitutionally *compelled* to carve out an exception to its general rule of eligibility in the present case." 374 U.S., at 423. Witters

does not ask for an exception to the general rule of eligibility in his case. Rather, he asks that the general rule be applied with equality to him despite his religion. He became eligible for aid because of an eye disease, not because of his religion. But his religion cannot, by virtue of the command of the Free Exercise Clause, be the sole grounds for his disqualification.

If Sherbert and Thomas were entitled to participation in the neutral government program of aid for the unemployed, as we believe they were, how much more should Witters be entitled to aid when it cannot even be argued that *he* is asking for an exception.

Justice Utter, dissenting in the State Supreme Court, discussed the applicability of the *Sherbert* and *Thomas* cases, concluding:

> The facts of this case are very similar to those in *Sherbert* and *Thomas*. While the State is not obligated to provide handicapped vocational education assistance, once it decides to do so I believe that the free exercise clause forbids the state from penalizing those who have chosen religious careers by excluding them from a general financial aid program solely for that reason.

102 Wn. 2d, at 642, 689 P.2d, at 63-64.

In one sense this case is closer to *Sherbert* and *Thomas* in that it involves eligibility for a neutral program of public assistance. However, in another sense, it is closer to *Widmar* since Witters is seeking equality, not a special exception.

In *Widmar*, the policymakers of the university decided that religious groups should be excluded from the limited public forum which the university had created. This Court held that it was a violation of the Free Exercise Clause to

treat religious student groups disparately solely on the religious content of their speech.

We believe that the principle of *Widmar* regarding the Free Exercise Clause is controlling here. The Department for the Blind has disparately treated Witters solely because of the religious content of his vocational training.

Again, we rely on *Widmar*, but we believe that the facts of this case not only brings us within the protection of its principles, but also answers the dissent in that case. Mr. Justice White dissented in *Widmar*, arguing that while the Establishment Clause certainly would not be violated by permitting a religious group to participate, it was within the discretion of the board of the University to decide whether or not to create exceptions to the general rule. 454 U.S. at 282.

In the case at bar, it was not the policymakers who excluded Witters for reasons within their discretion, it was the administrative agency which superseded the decision of the state legislature and made a determination that it was unconstitutional to provide the aid. Thus, Witters' situation not only fits into the criteria announced by the majority in *Widmar*, it also meets the concerns raised in the dissent.

Thus, this case possesses a sufficiently similar factual pattern to bring it within the precedential holdings of *Sherbert*, *Thomas*, and *Widmar*. The factual distinctives of this case demonstrate that the Department for the Blind's decision is more certainly violative of the Free Exercise Clause than even these three cases which we believe are controlling and upon which we rely.

We believe that we have demonstrated that the Department for the Blind's decision to exclude Witters from participation violates his right to the free exercise of

religion. However, the possibility exists, however remotely, that the Department could overcome this violation by demonstrating that their exclusion of Witters was required to further some compelling state interest. This Court has set forth the necessary showing which the Department must make in order to justify its denial of the free exercise of religion.

> The state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest. However, it is still true that "[t]he essence for all that has been said and written on the subject is that only those interests of the highest order . . can overbalance legitimate claims to the free exercise of religion." *Wisconsin* v. *Yoder*, [406 U.S. 205], 215 [(1972)].

Thomas v. *Review Board*, *supra*, 450 U.S., at 718.

The only reason that the Department for the Blind disqualified Witters was its belief that it was unconstitutional to permit him to participate. The Department contended, and the state courts found, that his participation was barred by the Federal Establishment Clause and by similar state constitutional provisions.

While it is obviously important for states to obey the Constitution of the United States and the State of Washington, this Court has repeatedly rejected similar justifications for denying the free exercise of religion. In *Sherbert*, *Thomas*, *Widmar*, and *McDaniel*, the state in each case raised the claim that the inroad on religious liberty was justified in the name of preserving the "separation of church and state." And in each case this Court rejected the claim whether it was based on the federal or the state constitution.[27]

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[27] See, *Sherbert*,374 U.S., at 409-410; *Thomas*, 450 U.S., at 719-720; *McDaniel*, 435 U.S., at 628-629; and *Widmar*, 454 U.S., at 273.

The majority of the Washington Supreme Court chose to avoid ruling on the state constitutional issues. Nonetheless, even if they had ruled that permitting Witters to participate violated the State Constitution, the application of the Free Exercise Clause would still overrule the state exclusion. Assuming that the State Constitution does not permit Witters' participation,[28] the case is still indistinguishable from *Widmar*. In *Widmar* this Court assumed that the state constitution prohibited the student group from meeting on campus. And in *McDaniel*, the state constitution specifically prohibited ministers from running for public office. Yet in both cases this Court held that the Free Exercise Clause prevailed over the state constitutional exclusions.

Thus, if the Department fails to convince this Court that the federal Establishment Clause prohibits Witters' participation, then their only claim to a compelling state interest evaporates. We believe that we have shown that the Establishment Clause cannot possibly be construed to prohibit the aid, therefore the claim of a compelling state interest which justifies the denial of the right of free exercise must necessarily fail.

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[28] The two provisions of the State Constitution are Article IX §4, which requires schools maintained with public funds to be free from sectarian influence or control, and Article I §11 which prohibits public monies from being used for religious worship, exercise, and instruction, or the support of any religious establishment. See, Justice Utter's excellent dissent in this case for a dispositive historical analysis of the intent and meaning of these sections. 102 Wn.2d, at 643, 689 P.2d, at 64.

CONCLUSION

The Religion Clauses of the First Amendment must be construed in harmony. When the Establishment clause is extended beyond what this Court has said and what the Founders intended, there is an inevitable danger that the Free Exercise Clause may be violated in the process. This is such a case.

Petitioner respectfully urges this Court to reverse the decision of the Washington Supreme Court and to remand with directions to allow him to participate in the program of aid to the blind in accordance with the statute. If his choice of a religious career is the sole basis for disqualification, then he must be permitted to participate and to recover amounts authorized for training he has already taken.

June 6, 1985

Respectfully submitted,

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